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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/019,402	12/28/2001	Hitoshi Matsumoto	VX012397 PCT	3876

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EXAMINER

JAGOE, DONNA A

ART UNIT	PAPER NUMBER
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1614

DATE MAILED: 11/25/2003

16

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Applicati n No.

10/019,402

Applicant(s)

MATSUMOTO ET AL.

Examiner

Donna Jagoe

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 27-40 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 27-40 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. §§ 119 and 120

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. ____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
* See the attached detailed Office action for a list of the certified copies not received.
- 13) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application) since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.
a) ☐ The translation of the foreign language provisional application has been received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121 since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 12.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). ____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

Claims 27-40 are pending in this application.

Response to Amendment

Objection of claims 22, 24 and 24 is no longer maintained in view of the amendment.

Rejection of claims 1-7, 13-14, 18-24 and 25 under 35 U.S.C. § 112 2nd paragraph is no longer maintained in view of the amendment.

Information Disclosure Statement

The information disclosure statement filed on December 4, 2002 in paper number 12 has been reviewed and considered. See enclosed copy of PTO FORM 1449.

New Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 39 and 40 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The term "improving blood fluidity" in claims 39 and 40 is a relative term, which renders the claim indefinite. The term "improving blood fluidity" is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the

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scope of the invention. Since no guidance is provided as to how "unimproved the fluidity of the blood" can be and still fall within the scope of the instantly claimed subject matter as circumscribed by the term "improved blood fluidity" the metes and bounds of the term are not clear, making it impossible to ascertain with reasonable precision when that term is infringed and when it is not.

The term "lowering blood pressure" in claims 39 and 40 is a relative term which renders the claim indefinite. The term "lowering blood pressure" is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. Since no guidance is provided as to how "high the blood pressure" can be and still fall within the scope of the instantly claimed subject matter as circumscribed by the term "lowering blood pressure" the metes and bounds of the term are not clear, making it impossible to ascertain with reasonable precision when that term is infringed and when it is not.

Response to Arguments

Applicant's arguments filed September 9, 2003 have been fully considered but they are not persuasive. The rejection made in paper number 10 over Lawhon et al. under 35 U.S.C. §103(a) is maintained and is hereby repeated.

Applicant asserts that the teachings of Lawhon do not contemplate or suggest the use of a charged reversed osmosis membrane. In response, Lawhon's abstract teaches that ultrafiltration is employed and then the UF permeate can be further treated

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by reverse osmosis to concentrate the flavor and aroma components in an RO retentate. Although, Lawhon does not specifically recite a "charged" reverse osmosis (RO) membrane, example 4 in column 10 recites that the RO membrane system is stated to have a 99% rejection for NaCl. It is well known in the art that reverse osmosis is capable of rejecting bacteria, salts, sugars, proteins, particles, dyes, and other constituents that have a molecular weight of greater than 150-250 daltons. The separation of ions with reverse osmosis is aided by charged particles. This means that dissolved ions that carry a charge, such as salts, are more likely to be rejected by the membrane than those that are not charged, such as organics. The larger the charge and the larger the particle, the more likely it will be rejected. Since the invention of Lawhon et al. rejects 99% NaCl, then the RO membrane is aided by charged particles.

In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., the charged reverse osmosis membrane fractionates polymers depending on a charge of polymer used) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). Applicant also indicates features of the ion exchange column wherein the ion exchange resin can be used to adsorb anthocyanins and concentrate them. This feature is not present in the instant claims. Applicant asserts that Lawhon teaches only blueberry or black chokeberry. However, in column 3, line 60, Lawhon et al. clearly teach fruit such as *inter alia* currants.

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Applicant's arguments filed September 9, 2003 have been fully considered but they are not persuasive. The rejection made in paper number 10 over Lawhon et al combined with Nakhmedov et al. and Laboratoires Chibret, Societe Anonyme under 35 U.S.C. §102(b)/103(a) is maintained and is hereby repeated.

Regarding applicants allegations that Lawhon et al combined with Nakhmedov et al. and Laboratoires Chibret, Societe Anonyme do not improve visual function by the same effect, since the prior art administers anthocyanin containing compositions and arrives at the same result, improvement of visual function, the function that is relied upon, but not claimed would be inherent. It is a well-settled proposition of patent law that the intended utility of an already well-known composition does not render the composition patentable. Applicants' attention is drawn to In re Dillon, 16 USPQ2d 1897 at 1900 (CAFC 1990). The court sitting en banc ruled that the recitation of a new utility for an old and well-known composition does not render that composition new. A recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. In a claim drawn to a process of making, the intended use must result in a manipulative difference as compared to the prior art. See *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 459 (CCPA 1963).

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Correspondence

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Donna Jagoe whose telephone number is (703) 306-5826. The examiner can normally be reached on Monday through Friday from 8:00 A.M. - 4:30 P.M..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Marianne Seidel can be reached on (703) 308-4725. The fax phone number for the organization where this application or proceeding is assigned is (703) 305-3230.

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Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1235.



Donna Jagoe
Patent Examiner
Art Unit 1614

Frederick Krass
Primary Examiner
Art Unit 1614

